ADAMS, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SUMMIT COUNTY DEMOCRATIC CENTRAL AND EXECUTIVE COMMITTEE, *et al.*,	)	CASE NO. 5:04CV2165
Plaintiff(s),	)	Judge John R. Adams
v.	)	ORDER
	)	[Resolving Docs. 3, 7]
OHIO SECRETARY OF STATE, J. KENNETH BLACKWELL, *et al.*,	)	
Defendant(s).		

This case comes before the Court on Plaintiffs' Motion for a Temporary Restraining Order (TRO) (Doc. 3). For the reasons stated herein, the Court GRANTS IN PART Plaintiffs' Motion. Specifically, the Court finds that persons appointed as challengers under Ohio Revised Code § 3505.20 may not be present at Ohio's polling places on November 2, 2004 for the sole purpose of challenging the qualifications of other voters.

I. BACKGROUND

Plaintiffs are: the Summit County Democratic Central and Executive Committee; Marco Sommerville; Karen Doty; Timothy Gorbach; James B. McCarthy; Jane Doe Citizens of the United States and Residents of Ohio Nos. 1 through 20; and John Doe Citizens of the United States and Ohio Nos. 1 through 20. Plaintiffs in their Verified Complaint and Motion for TRO request relief against all Defendants: J. Kenneth Blackwell (Secretary of State of Ohio); Patricia Wolf (Director of Elections of

Ohio); Bryan C. Williams (Director of the Summit County Board of Elections); John N. Schmidt (Deputy Director of the Summit County Board of Elections); Wayne M. Jones, Alex R. Arshinkoff, Joseph F. Hutchinson, Jr., and Russell M. Pry, (members of the Summit County Board of Elections); Unknown Government Officials 1 through 20 of the State of Ohio; and Unknown "Challengers" 1 through 475, as that term is used in Ohio Revised Code § 3505.20. Plaintiffs sue Defendants in their official capacities only.[1]

Plaintiffs sue under 42 U.S.C. § 1983, requesting in the Verified Complaint that this Court declare unconstitutional § 3505.20 and other relief. Specifically, Plaintiffs in their Verified Complaint ask the Court to, among other things (a) declare void and unenforceable as violative of the First and Fourteenth Amendments to the Constitution the provisions of § 3505.20 establishing a scheme through which potential voters may be challenged and denied a ballot by action of election judges and (b) preliminarily and permanently enjoin Defendants, their agents, employees, representatives, successors, and all persons acting in concert with them from condoning, authorizing, conducting, or ordering any of the challenge process set forth in § 3505.20.

In their Motion for TRO, which is the sole focus of this Order, Plaintiffs seek to have this Court issue an order enjoining Defendants from carrying out the challenge process set forth in § 3505.20 in the polling places of Summit County during the November 2, 2004 election. Plaintiffs claim that if they are denied the preliminary relief they seek, voters will be subjected to a challenge process that deprives them of due process and equal protection.

---

[1] Plaintiffs have stipulated to dismissal of all claims against Defendants in their individual capacities.

The contested statute provides that the right of an individual to vote on election day may be challenged by a challenger appointed pursuant to § 3505.21, or by any elector (voter) then lawfully in the polling place, or by any judge or clerk of elections.[2] Section 3505.20 allows a potential elector to be challenged on grounds that the individual does not meet one or more of the qualifications of an elector set forth in § 3503.01. Section 3503.01 provides that "[e]very citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a resident of the county and precinct in which the citizen offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and may vote at all elections in the precinct in which the citizen resides." Ohio Rev. Code § 3503.01. Accordingly, under § 3505.20, an elector may be challenged on the grounds that the elector is not qualified to vote for reasons of citizenship, age, or residence. *Id.* § 3505.20. For each of these circumstances, § 3505.20 lists questions to be asked by the judges of the precinct. *Id*. The statute also provides that the presiding judge "shall put other questions to the person challenged . . . as are necessary to test the person's qualifications as an elector at the election." *Id*.

Section 3505.20 further specifies that a prospective elector may be denied a ballot under

---

[2]The process for appointing challengers is specified in § 3505.21. Under the statute, challengers can be appointed in one of three ways. *Id.* A political party may appoint a challenger by filing a notice of appointment, which is signed by both the political party central committee chairman and secretary. *Id.* A notice of appointment may be filed by a group with at least five candidates. *Id.* Or, a committee supporting or opposing a ballot issue may create a committee to appoint challengers. *Id.* The committee would then file the notice of appointment. Judges are appointed pursuant to the terms of § 3501.22. *Id.*

The statute continues on to provide that any political party can appoint a qualified elector to serve as a witness during the counting of ballots. *Id.* The Court's decision does not modify or address the portion of the statute that allows for a witness to be present during the counting of ballots, as that specific provision is beyond the scope of both Plaintiffs' Complaint and requested relief.

certain circumstances. The statute states that if a challenged voter refuses to answer the questions posed, or is unable to answer the questions as they were answered on his or her registration form, or if for any reason a majority of the judges believes the person is not entitled to vote, the judges can refuse the person a ballot. *Id*. That decision is final. *Id.*

The judges referred to in the statute are precinct officials. *Id.* at 3501.22. They are appointed by the board of elections after a careful examination and investigation into their qualifications is conducted. *Id.* One person, who is a member of the dominate political party, is designated to serve as the presiding judge. *Id.* In Ohio, the dominant political party is the party that polled more votes in that precinct for the candidate for governor in the last governor's race. As a result, the political party affiliation for the presiding judge will vary from precinct to precinct. Not more than one-half of the total number of judges may be members of the same political party. *Id.*

Plaintiffs filed their Verified Complaint and Motion for TRO late in the afternoon on Thursday, October 28, 2004. On Friday, October 29, 2004 the Court held a telephonic conference on the record regarding Plaintiffs' Motion for TRO. Counsel for the parties participated and presented arguments in support of and in opposition to Plaintiffs' request for preliminary injunctive relief. Due to the time constraints involved, the Court is prevented from holding an evidentiary hearing on the Motion for TRO prior to issuing this opinion.

At the telephonic conference, the Court considered, in addition to the Motion for TRO, the Motion to Intervene of Challengers. (Doc. 7). The Motion to Intervene was filed by four named individual challengers for the November 2, 2004 elections from Allen, Franklin, Summit, and Warren counties. The movants, acting individually and as representatives of all other similarly situated

challengers from all Ohio counties, except Hamilton County, requested an order granting them leave to intervene as defendants in this case. After due consideration, the Court granted the Motion to Intervene. (Doc. 18). Accordingly, this Order applies statewide to all Ohio challengers for the November 2, 2004 elections, excepting Hamilton County challengers.

The Court indicated, at the telephonic conference, that the deadline for filing oppositions to the TRO would be 4:00 p.m. on October 29, 2004. Although Defendant Blackwell filed an Opposition past the stated deadline, the Court has considered his Opposition despite its untimeliness.

Also on October 29, 2004 at approximately 8:30 p.m., the State of Ohio filed a Motion to Intervene in this litigation. The Court has granted the State's Motion to Intervene. (Doc. 19). The State has advised the Court, via email, that it joins in Defendant Blackwell's Opposition and does not intend to file a separate brief.

II. JURISDICTION AND STANDING

The Court has jurisdiction to consider this case under 28 U.S.C.§§ 1331, 1343(a)(3), and 1343(a)(4). The Court also has subject matter jurisdiction under 28 U.S.C. § 1343 because Plaintiffs have asserted a claim for relief under 42 U.S.C. § 1983 alleging a deprivation of rights under color of state law. Further, the Court has supplemental jurisdiction to adjudicate state claims pursuant to 28 U.S.C. § 1367(a) as they are so closely related to federal claims over which the Court has original jurisdiction that they form part of the same case or controversy under Article III of the Constitution.

Nonetheless, the Court will lack subject matter jurisdiction if Plaintiffs lack standing to pursue this case. *Ward, D.C. v. Alternative Health Delivery Sys., Inc.*, 261 F.3d 624, 626 (6th Cir. 2001). Thus, the Court examines Plaintiffs' standing before turning to the merits of Plaintiffs' Motion for TRO.

Plaintiffs are named individual potential voters, Jane and John Doe potential voters, and a political association. If the Court determines that any one of Plaintiffs have standing, the Court has jurisdiction to hear the case. *See Cary v. Population Servs. Int'l*, 431 U.S. 678, 682 (1977) (recognizing that when at least one plaintiff has standing to challenge all aspects of asserted claims, a court need not determine the standing of other plaintiffs). For the reasons stated herein, the Court determines that Plaintiffs meet the standing requirements to proceed with this action.

Each of the individual named plaintiffs (Sommerville, Doty, Gobach, and McCarthy) (the "Individual Plaintiffs") alleges that he or she is at least 18 years old, is a United States citizen, has resided in Summit County since at least October 2, 2004, and is not currently incarcerated.[3] None of the Individual Plaintiffs have been declared incompetent to vote. All of the Individual Plaintiffs have registered to vote in Summit County, Ohio, and currently intend to cast their votes in the November 2, 2004 general election for local, state, and national offices.

Plaintiff Summit County Democratic Central and Executive Committee (the "SCDC") is a political association based in Summit County that consists of member individuals who reside in Summit County and who support, are affiliated with, or are otherwise members of the Ohio Democratic Party. The SCDC sues on its own behalf and on behalf of its members.

In order to establish standing under Article III, a plaintiff must meet three requirements. A plaintiff must demonstrate that: "(1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the

---

[3] Under Ohio law, a convicted felon who is incarcerated may not vote.

challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sandusky County Democratic Party v. Blackwell*, Nos. 04-4265 and 04-4266, 2004 WL 2384445 *6 (6th Cir. Oct. 26, 2004) (citations and internal quotations omitted).

Under these principles, Plaintiffs at a minimum have standing to bring this case on their own behalf. Plaintiffs in their Verified Complaint have alleged an imminent and particularized injury, that they will be deprived of equal protection and due process rights if subjected to the challenge process as set forth in § 3505.20, that Defendants are responsible for conceiving, authorizing, conducting, and/or ordering the purportedly unconstitutional challenge scheme, and that the injury complained of will be redressed by a court order prohibiting Defendants from utilizing the challenge process in the polling places of Summit County during the November 2, 2004 election.

The fact that Plaintiffs have not yet been challenged at the polls does not render their claims so conjectural or hypothetical as to deprive them of standing. A voter cannot know in advance whether he or she will be challenged at the polls. It is inevitable, however, and Defendants do not attempt to deny, that such challenges will take place. *See id*. (finding standing to challenge the Secretary of State's directive governing issuance of provisional ballots in Ohio elections even though no voter had yet been denied a ballot under the contested directive).

Moreover, Plaintiff SCDC has standing to bring this case on behalf of its members. As the Sixth Circuit recently has recognized, a political association has standing to sue on behalf of its members when its members otherwise would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires

the participation of individual members in the lawsuit. *Id.* (quotations and citations omitted). Individual member participation typically is not necessary when an association seeks prospective or injunctive relief for its members. *Id*.

Accordingly, Plaintiffs have standing because they have sufficiently alleged in the Verified Complaint that, as a consequence of Defendants' conduct, Plaintiffs face an imminent and particularized risk of the deprivation of their constitutionally-guaranteed due process and equal protection rights. Having determined that Plaintiffs have standing to pursue this action, the Court now turns to the legal standard according to which it must consider Plaintiffs' Motion for TRO.

III. LEGAL STANDARD & ANALYSIS

Federal Rule of Civil Procedure 65 permits the Court to grant a temporary restraining order. When deciding whether preliminary injunctive relief should issue, the Court considers four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of preliminary injunctive relief would cause substantial harm to others; and (4) whether the public interest would be served by issuance of preliminary injunctive relief. *See Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

1. Likelihood of Success on the Merits

The Tenth Amendment expressly provides to states the power to regulate elections. *Oregon v. Mitchell*, 400 U.S. 112, 124-26 (1970). This includes the ability to place regulations on both the manner and means of both state and federal voting. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

[T]here must be a substantial regulation of elections if they are to be fair and

> honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Storer v. Brown, 415 U.S. 724, 730 (1974). However, this power is not without limits. *Sandusky County Democratic Party*, 2004 WL 2384445 at *2.

Plaintiffs argue that the contested provisions of this statute permit potential voters to be denied their right to vote without an opportunity to be represented by counsel, to rebut evidence, to confront the challenger, to introduce evidence in his or her favor, or to otherwise participate in the process as anything other than an interrogated witness. Plaintiffs further state that if the potential voter is denied a ballot at the discretion of a majority of the judges, for any reason, the voter has no opportunity to appeal and is effectively denied his or her voting rights.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), sets forth factors that a district court must apply when deciding constitutional challenges to specific provisions of a state's election law:

> [A] court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

Id. (internal citations omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). If an election

regulation imposes a severe burden, the state regulation must be narrowly drawn to serve a compelling state interest. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-60 (1997). If the regulation imposes a lesser burden, however, the regulation must only be justified by important state regulatory interests. *Id.*; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

A. Plaintiffs' Burden

Under *Anderson*, this Court must consider the character and magnitude of Plaintiffs' asserted injury to the rights protected by the First and Fourteenth Amendments. Plaintiffs argue that the presence of challengers at the polls will infringe on their fundamental right to vote. This Court recognizes that the right to vote is one of our most fundamental rights. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1976). Potential voter intimidation would severely burden the right to vote. *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Therefore, the character and magnitude of Plaintiffs' asserted injury is substantial.[4]

B. Defendants' Interests

The Court must next identify and evaluate the precise interest asserted by Defendants to justify the burden imposed by the statute. Defendants argue that the presence of challengers at the polls is necessary to safeguard against voter fraud and to ensure the integrity of the voting process. This Court agrees that "unfettered voter fraud negates the impact of individual votes and destroys the legitimacy of the electoral process." *Vargas v. Calabrese*, 634 F. Supp. 910, 929 (D.N.J. 1986). Prevention of

[4]The record before the Court is limited to the Verified Complaint and the affidavits appended thereto. Plaintiffs have filed a Verified Complaint and Motion for TRO supported by appropriate affidavits. The facts alleged in these papers have not yet been denied or contradicted by countervailing evidence and must be accepted as true. *O'Connor v. Bd. of Educ.*, 449 U.S. 1301, 1301 (1980).

election fraud is a compelling state interest. *Burson*, 504 U.S. 206. In recognizing this fact, however, the Court must consider the extent to which Defendants' interest in having challengers present at the polls is necessary.

C. Tailoring the Regulation

As previously stated, if a regulation imposes a severe burden, it must be narrowly drawn to serve a compelling state interest. *Timmons*, 520 U.S. at 358-60. The state has a compelling interest in preventing election fraud; however, if there are other reasonable ways to achieve those interests with a lesser burden on the constitutionally protected activity, the state must chose those less drastic means. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

Here, the portion of the statute that allows appointed challengers to challenge another person's eligibility is not narrowly tailored to serve the State's compelling interest in preventing voter fraud because other provisions of the code contain such safeguards. For instance, duly appointed election judges can challenge the qualifications of voters as provided for in various provisions of the code. *See generally* § 3505 *et seq.* In addition, there are other protections in place that prevent against fraud. *See generally* § 3505.19 (setting forth the process for handling voter challenges prior to election day). Moreover, the presence of the challengers serves the same interest as that of the election judges, except that the presence of the challengers may pose an undue burden on voters and election officials. There is little, if no, evidence that establishes the need for such challengers, given that the election officials can protect the State's interest. Therefore, the statute is not narrowly tailored to serve a compelling state interest in preventing fraud at the polls.

2. Irreparable Harm

Because this Court has found that Defendants' challenged actions will likely threaten or impair Plaintiffs' constitutional right to vote, the Court must find that Plaintiffs will suffer irreparable injury if the preliminary injunction does not issue. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (noting that the denial of an injunction can cause irreparable harm if Plaintiffs' claim is based upon the violation of a constitutional right).

3. Substantial Harm to Others

In this case, the potential for irreparable harm to Plaintiffs outweighs substantial harm to others. As previously stated, Plaintiffs could suffer irreparable harm. The likelihood of substantial harm to others, however, is lesser by comparison. As previously stated, the statute does provide for challenges to take place by election judges and the clerk of elections. Because of this, the likelihood of substantial harm to others, voter fraud is minimized. The mere presence of challengers at the polls does not further minimize this harm if other duly appointed officials can make such challenges.

It is important to note that Plaintiffs' right to cast votes on election day is a fundamental right. The challengers, however, do not have a fundamental right to challenge other voters. *See Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291 (6th Cir. 1993) (finding the act of signing a petition to get an initiative placed on a ballot is not entitled to the same protection as voting). When weighing the harms to the parties, the Court is compelled to tip the scales in Plaintiffs' favor.

4. Public Interest

The final factor the Court must consider in deciding whether preliminary injunctive relief should issue is whether such relief would serve the public interest. While undoubtedly it always is in the public

interest to prevent violation of a party's constitutional rights, *Deja Vu of Nashville, Inc. v. Metro Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001), in situations like this one the Court must weigh two competing interests: an individual's right to participate in elections without interference and the State's interest in regulating such elections. *Vargas*, 634 F. Supp. at 928 (citing *Storer*, 415 U.S. at 730; *Anderson*, 460 U.S. 780). In the absence of a "litmus-paper test" to determine the constitutionality of state election laws, the Court instead must carefully balance an individual's right to vote and the States's interests in preventing voter fraud through procedures for checking voter qualifications. *Id*.

In its efforts to strike the appropriate balance between ballot access and ballot integrity in this case, the Court is acutely aware of the deference to which the State is entitled with respect to the creation and implementation of laws for the determination of voter qualifications. *See Brown*, 415 U.S. at 730. Under the extraordinary circumstances present here, however, the public interest weighs in favor of restricting Defendants' implementation of § 3505.20 to prohibit challenges by appointed challengers.

In light of these extraordinary circumstances, and the contentious nature of the imminent election, the Court cannot and must not turn a blind eye to the substantial likelihood that significant harm will result not only to voters, but also to the voting process itself, if appointed challengers are permitted at the polls on November 2. The Court cannot overlook the practical concerns that the presence of appointed challengers at the polls could significantly impede the electoral process, and infringe on the rights of qualified voters. When challenges occur, election judges would be diverted from their duties at the polling places to question voters and rule upon challenges. Random challenges or challenges

without cause advanced by members of any political party could result in retaliatory "tit-for-tat" challenges at the polling places. Election officials would then be faced with the time-consuming task of ruling upon numerous challenges, diverting them from assisting voters. If challenges are made with any frequency, the resultant distraction and delay could give rise to chaos and a level of voter frustration that would turn qualified electors away from the polls. While this harm arguably is speculative, should it occur to any significant extent, the integrity of the election may be irreparably harmed.

The public interest is best served if the Court prohibits Defendants from implementing the portions of § 3505.20 that permit challenges by appointed challengers. The compelling purposes behind § 3505.20 – to prevent voter fraud and ensure that only qualified electors vote – are not thwarted by such a prohibition. Under the Court's ruling, the election officials to whom § 3505.20 refers are permitted to challenge voter eligibility on the basis of citizenship, age, and residency, and thus provide adequate assurance that only individuals meeting the voter eligibility requirements of § 3503.01 cast ballots on November 2. Accordingly, the public interest in unimpeded access to the ballots is achieved without sacrificing the State's interest in preventing voter fraud.

Notwithstanding the above, this Court is not prepared to grant Plaintiffs' other requests for injunctive relief, recognizing the State's legitimate interest in preventing voter fraud. The Court finds those provisions allowing precinct judges and the clerk of elections to challenge a voter's qualifications - such as citizenship, residency, and age - would likely pass constitutional muster.[5] Although Plaintiffs take issue with the election judge's unfettered discretion to deny a voter a ballot, the Court finds this

[5] For example, according to the Sixth Circuit's holding in *Sandusky*, an election official must retain the authority to refuse to allow a provisional ballot to be cast by an elector offering to vote in a precinct other than that in which the elector resides. *Id.*

potential harm remedied, as to the federal election, by the Help America Vote Act's requirement that a provisional ballot be provided. *Sandusky County Democratic Party*, 2004 WL 2384445 at *1 (interpreting 42 U.S.C. § 15482).

IV. CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for TRO is granted in part and denied in part. It is granted to the extent persons appointed as challengers may not be present at the polling place for the sole purpose of challenging the qualifications of other voters. The motion is denied as to all other requests for relief.

IT IS SO ORDERED.

October 31, 2004
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge